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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARCHIE BROWN, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

The Government defines the question presented as follows:

> "Whether 29 U.S.C. 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is unconstitutional."

So presented, we think the question is much too broadly stated. It is submitted that the Court of Appeals framed the question accurately, in these words:

"Whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments" (Petition, 11[1]).

STATEMENT

The government does not affirmatively argue that the decision below was incorrect. It does not assert that a decisional conflict exists among the Circuits. And, while relying on this Court's decision in *American Communications Association v. Douds*, 339 U.S. 382, the government does not actually claim that the decision below is in conflict with *Douds*.

What the government does urge, is that

(1) because the prohibitions of 29 USC 504 (quoted in the Petition at page 2) were part of "a major revision of the national labor laws enacted by Congress after long controversy and mature deliberation"; and hence "the statute has a general and continuing importance"; and

(2) because Section 504 was adopted by Congress to replace Section 9(h) of the Labor Management Relations Act of 1947, and this Court had previously upheld the constitutionality of Section 9(h),

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[1]The page references used herein are to the pagination of the Petition, not to that of the Court of Appeals' opinion.

therefore "review by this Court is plainly warranted" (Petition, 4-5).

We do not deny that the question is important. We submit, however, that it was correctly answered below. If this Court agrees to review the matter, it should affirm the decision below upon the grounds relied upon by the Court of Appeals.

ARGUMENT

The Court of Appeals held that Congress could not "impose personal criminal sanctions on . . . [the] . . . basis of political affiliation, by providing that mere membership in the Communist Party, when combined with union officership is conclusive of guilt." (Petition, 12.) It held that legislation which did that, violated rights guaranteed by the First and the Fifth Amendments to the Constitution.

The holding below was based upon this Court's decisions in *Scales v. United States,* 367 US 203, and *Noto v. United States,* 367 US 290. Their import was that membership in the Communist Party could not be made criminal under the First Amendment without proof, in the particular case, (1) that the Party was engaged in the advocacy of action, unprotected by the First Amendment, to accomplish violent overthrow of government; and (2) that the defendant had the personal specific intent to further such unlawful purposes. The government does not suggest that the Court below incorrectly read this Court's decisions in *Scales* and *Noto*; nor does it say that the First

Amendment requires anything less than what this Court, in those cases, said it requires.

It is, we submit, indisputable that both on its face and as applied here,[2] the statute resulted in a criminal conviction without proof of either of these—or other[3]—constitutionally essential elements.

The Court below quite correctly distinguished *American Communications Association v. Douds*, 339 US 382, a decision by a closely divided Court, from the instant case. In brief, *Douds* involved the withdrawal of a government privilege (access to facilities of the National Labor Relations Board) for the failure of a union officer to declare under oath his nonmembership in the Communist Party. But here, there is imposition of "personal criminal sanctions" for mere Communist Party membership when combined with union officership. The difference in the quality of the restraint and the force with which it is to be applied (Petition, 14-15) demonstrates that "[t]his case then is far different from Douds" (Petition, 16). That being so, the divided decision in *Douds* does not control the disposition of this case, in which the statute makes criminal the assertion of First Amendment rights.

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[2]The District Court rejected respondent's offer of evidence that he had no intent (or ability) to bring about any such substantive evil, and it refused to give respondent's requested instructions requiring a finding of such intent (or ability) before a guilty verdict could be returned. (Petition, 12, n. 4.)

[3]The District Court also rejected respondent's offer of evidence that neither the Union nor the executive board had any intent or ability to bring about any substantive evil (R.T. 466-467, 470), and it refused to give respondent's requested instructions requiring a finding of such intent or ability before a guilty verdict could be returned. (C.T. 26; R.T. 484, 607.)

Since the statute at bar is a criminal statute, the due process requirements of the Fifth Amendment, which were not present in *Douds*, must likewise be considered here. The instant statutes impermissably imputes guilt to a defendant because of his membership in the Communist Party, rather than because of some concrete personal involvement in criminal conduct. (Petition, 17-18.) Clearly, as the Court below held, such a statute cannot withstand the condemnation of the Fifth Amendment's due process clause.

In addition, it is clear that no judicial construction can limit the statute to make it Constitutional. In the first place, the government did not seek below (nor does its present petition seek) to limit the statute in any way. In the second place, as the Court below pointed out (Petition, 19-20) the statutory language is not ambiguous. The statute is "overbroad" and is "so wholly lacking in notice of the constitutionally essential components of the crime" as to render it invalid on its face (as well as invalid as here applied). (See *Thornhill v. Alabama,* 310 US 88 and *Carlson v. California,* 310 US 106.)

Finally, although it did not cite them, the opinion below comports entirely with this Court's recently expressed views that, even in a non-criminal case,

> "... [t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminal accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

> . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breeding space to survive, Government may regulate in the area only with narrow specificity."
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> *National Association For The Advancement of Colored People v. Button,* 371 US 415, 433.

How much more true is this in a criminal prosecution.

CONCLUSION

If the Court accepts the government's position that the question is important enough to call for an expression of this Court's views, we urge that upon issuing the writ this Court affirm the judgment upon the manifestly correct and constitutionally sound opinion of the Court of Appeals.

Dated, San Francisco, California,
September 8, 1964.

Respectfully submitted,

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